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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY,
Petitioner,

v.

OWENS-ILLINOIS GLASS COMPANY ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS WRIT OF CERTIORARI

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TABLE OF CASES

Page

Ammons v. *Ammons*, 50 W. Va. 390 8

Bank v. *Cain*, 107 W. Va. 309 8

Dunfee v. *Childs*, 45 W. Va. 155 8

In re Georgian Hotel Corporation, 82 F. (2d) 917. 9

Illinois Central Ry. Co. v. *Adams*, 180 U. S. 28 9

Male v. *Atchison, etc. Ry. Co.*, 240 U. S. 97 9

Old Colony Trust Co. v. *Seattle*, 271 U. S. 426 9

STATUTE CITED

Code of West Virginia, ch. 58, art. 5, sec. 4 12

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The respondents have moved to dismiss the writ of certiorari upon the ground that the question presented by it is moot, and that by reason of changes in the circumstances of the parties, "and especially of the property of the petitioner", no relief can ultimately be granted the petitioner in the pending litigation to which said writ applies.

In support of their motion they have filed copies of certain decrees entered and papers filed in the cause of John B. Bell et al. v. Wayne United Gas Company et al., pending in the Circuit Court of Kanawha County, West Virginia.[1] It appears from these exhibits filed in support of the motion that it is without merit and should be denied, for the following reasons:

I.

The Glass Companies, which are respondents to the writ of certiorari, notwithstanding that they had submitted themselves to the jurisdiction of the Disrict Court in the proceedings for reorganization therein, instigated and procured the sale of petitioner's properties in the state court, over petitioner's objection and in disregard of the fact that this writ is pending in this court, and at such sale became the purchasers of petitioner's property, using its first mortgage bonds held by them in payment therefor. It appears from the copy of the "Supplemental Decree of Sale" of the Circuit Court of Kanawha County, entered on the 10th day of August, 1936, filed as Exhibit A with the motion to dismiss, that petitioner, Wayne United Gas Company, brought to the attention of the Circuit Court of Kanawha County by suggesting upon the

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1 The majority an minority opinions of the Supreme Court of Appeals of West Virginia in the cause of John B. Bell, et al v. Wayne United Gas Company, et al are reported in 116 W. Va. 280, 181 S. E. 609; the decision of said Supreme Court was by a vote of three to two, two of the five judges holding that the First Mortgage Bonds of the Wayne United Gas Company, held by the Glass Companies, as appellees in said cause, were subject to the equities asserted by the appellants.

record in the Bell suit the facts relating to the filing of its petition in the District Court of the United States for the Southern District of West Virginia for reorganization under Section 77B of the Bankruptcy Act, and the proceedings that had been taken in both the District Court and the Circuit Court of Appeals for the Fourth Circuit upon said petition up to August 10, 1936, including the fact that it intended to apply to this court for a petition of certiorari to review the decree of the Circuit Court dismissing its appeal in the reorganization proceeding; including the fact that the District Court had granted a supersedeas to its decree of May 28, 1936, dismissing the petition for reorganization, which had been perfected on June 11, 1936, (R. 62) and the further fact that the Circuit Court of Appeals, on July 28, 1936, had stayed its mandate pending the application of petitioner to this court for a writ of certiorari (R. 64). It further appears that thereupon petitioner moved the court to direct the Special Commissioners appointed to make the sale of petitioner's property to take no proceedings until this court should act upon petitioner's application for said writ to review the order of the Circuit Court entered on July 4, 1936, dismissing the petitioner's appeal from the order of the District Court entered May 28, 1936, *which motion the Glass Companies resisted.* The Circuit Court thereupon overruled petitioner's motion and directed the Special Commissioners to proceed with the sale of said property, to which petitioner objected and excepted.

It further appears from the copy of the decree of confirmation entered by the Kanawha Circuit Court on October 14, 1936, (Exhibit C with said motion to dismiss) that petitioner on that day filed its written objections to the confirmation of sale of its properties made by the Special Commissioners on October 1, 1936, (Exhibit C) and in support of its objections filed a stipulation between counsel for the Glass Companies and petitioner's counsel (Exhibit C-1). It was thus stipulated:

> (1) That this court, on the 12th day of October, 1936, had granted this writ of certiorari. A printed copy of the transcript of the record upon said writ was filed as a part of the stipulation. Also, that H. G. Phillips, the purchaser of the property sold by the Special Commissioners on October 1, 1936, was vice-president of one of the respondent Glass Companies "and that his bid was made for the defendants, Owens - Illinois Glass Company and Libbey - Owens - Ford Glass Company".
>
> (2) That the petitioner had applied to the Supreme Court of Appeals of West Virginia for an appeal and supersedeas from the Supplemental decree of sale of August 10, 1936, which had not yet been acted upon.
>
> (3) That the property for which Phillips had bid $1,225,500.00 included the sum of $546,726.02 in cash and $18,000.00 in account receivable from the two Glass Companies for gas purchased by them from the Receivers.

Petitioner objected to the confirmation of the sale because of the fact that the decrees of the District Court and of the Circuit Court of Appeals dismissing its petition for reorganization had been superseded and stayed, and the decree of the Circuit Court of Appeals was before this court for review upon the writ of certiorari, as above stated. The respondent Glass Companies nevertheless again moved the court to approve and confirm the sale reported by the Special Commissioners. By its decree entered on the 2nd day of December, 1936, (Exhibit D) the Kanawha Circuit Court overruled petitioner's objections to confirmation of the sale, and confirmed the sale reported by them to Phillips or his assignees, directing the Special Commissioners to execute and deliver deeds and other instruments conveying and assigning to the purchasers the property sold by them. The court set December 8, 1936, as the day for determining allowances to be made for compensation and expenses of the Commissioners, Receivers, Trustees and their counsel. The decree of December 21, 1936, (Exhibit E) shows that such allowances out of said fund (aggregating $564,726.00 in the hands of the Receivers), aggregating $77,274.16, were made by the court over the renewed objections of petitioners. The Special Commissioners were directed to execute a deed for the property sold by them to the Glass Companies as assignees of Phillips, and the Glass Companies were given the right to use petitioner's first mortgage bonds held by them in part payment of the price bid by

Phillips for the property, each bond being assigned a value for such purpose of $767.576. To all this petitioner objected, and moved the court "to defer and postpone all disbursements of the aforesaid moneys and the execution of the aforesaid deed until after the federal courts have finally passed upon the aforesaid proceedings pending therein." The Glass Companies objecting to the motion and insisting upon immediate execution of the decree, the state court overruled petitioner's objections, to which it again excepted.

Thereafter, by deed dated the 17th day of December, 1936, the Special Commissioners and others conveyed petitioner's West Virginia property to the respondents herein, Owens-Illinois Glass Company and Libbey-Owens-Ford Glass Company, which now hold legal title and ownership thereof. It thus appears that as a result of the proceedings in the state court, the respondent Glass Companies, in disregard of the pendency of this writ in this court, have insisted upon and procured the sale of petitioner's properties embraced in the first mortgage securing petitioner's bonds, and have themselves become vested with the legal title thereto. They now urge their own action as ground for dismissing the writ of certiorari, which this court has granted for the purpose of reviewing the correctness of the decree of the Circuit Court of Appeals in dismissing petitioner's appeal from the order of the District Court, dismissing petitioner's petition for reorganization. They allege in support of this ground

that by their own action they have made it impossible for petitioner to obtain the relief which it seeks by its petition for reorganization. This, we submit, is highly fallacious.

The Glass Companies intervened in petitioner's proceeding for reorganization in the District Court and became parties to it. That proceeding is still pending in the District Court. The Glass Companies are still subject to the jurisdiction of that court, and will be bound by any order which either this Honorable Court or the Circuit Court of Appeals or the District Court may make in or affecting petitioner's proceeding for reorganization. If this court shall reverse the decree of the Circuit Court of Appeals dismissing petitioner's appeal, and it shall be held as a result thereof that petitioner is entitled to reorganization under the provisions of Section 77B of the Bankruptcy Act, in accordance with the prayer of its petitions for reorganization, the Glass Companies will still be before the District Court and subject to such order as it may enter for the purpose of making the reorganization effective. If a trustee be appointed by the District Court, the Glass Companies may be required to deliver to him petitioner's properties which they have thus purchased. The situation is that the Glass Companies now hold the legal title to such property subject to such order as the federal courts having jurisdiction of the matter may make affecting the same. The situation is essentially different from that where

property is sold and passes into the hands of third parties who are strangers to the litigation. It is settled law in West Virginia that where property is purchased at a judicial sale by a party to the suit in which the property was sold, the title of such purchasers is not protected, but fails in the event the decree of sale be reversed. In *Dunfee* v. *Childs*, 45 W. Va. 155, 164, in holding that a West Virginia statute protecting purchasers at judicial sales did not apply to a party to the suit who procured the sale, the court said:

> "The same reason does not exist for protecting him as an innocent third person. He moves the proceeding. Shall they who procure an erroneous decree, and under it get the defendant's property, hold fast to the fruits of that erroneous decision? Must not he make restitution of all he yet has in hand? Justice would say so."

This rule has been repeatedly affirmed by the Supreme Court of Appeals of West Virginia in a line of cases which include

> *Ammons* v. *Ammons*, 50 W. Va. 390;
> *Bank* v. *Cain*, 107 W. Va. 309.

The fact that before the filing of a petition for reorganization under Section 77B, an equity suit has been commenced in a state court to foreclose the lien of the bonds affected by the plan of reorganization, which had progressed to the entry of a foreclosure

decree, does not prevent the bankruptcy court from authorizing reorganization. *In re Georgian Hotel Corp.*, (C.C.A. 7th, 1936) 82 F. (2d) 917. Here the Glass Companies, who voluntarily became parties to the reorganization proceeding in the District Court, have gone a step farther and, pending the reorganization proceeding, have procured the decree of foreclosure to be executed, as a result of which they now hold the properties affected by the reorganization. We submit that they will not be permitted thus to divest the federal courts of jurisdiction and to profit by their own action, in deliberate disregard of the pendency of proceedings to which they are parties in the federal courts.

II.

Under the applicable decisions of this court, the proceedings in the state court, upon which petitioner's motion to dismiss is grounded, go to the merits and will not be considered by this court upon an appeal involving solely a question of procedure.

> *Illinois Central R. Co.* v. *Adams*, 180 U. S. 28;
> *Old Colony Trust Co.* v. *Seattle*, 271 U. S. 426;
> *Male* v. *Atchison, etc., Ry. Co.*, 240 U. S. 97.

Illinois Central R. Co. v. *Adams*, supra, was an appeal to this court from the Circuit Court of the United States for the Southern District of Mississippi to review a decision dismissing a bill for injunction against the collection of state taxes on a railroad. Plaintiff

filed its bill against the defendant Adams as Revenue Agent of Mississippi, the Railroad Commission of the State, and the Canton, Aberdeen & Nashville Railroad to enjoin the Railroad Commission from certifying an assessment of taxes against the Canton Railroad for any of the years from 1886 to 1897 and to enjoin the Revenue Agent from taking any steps to collect the taxes. A temporary injunction issued upon filing the bill, but was subsequently dissolved and an appeal taken by the plaintiff to the Circuit Court of Appeals. This appeal was dismissed for want of jurisdiction, and a final decree subsequently entered in the Circuit Court dismissing the bill. The Circuit Court certified certain jurisdictional questions to this court.

Adams filed in this court a motion to dismiss the certified questions on the ground that before the bill was dismissed in the trial court, he had brought a suit in equity in the chancery court of Clay County, Mississippi, against the plaintiff, Illinois Central Railroad, and the Canton Railroad to collect the same taxes involved in the instant suit; that the defendants in their answer set up the same defenses relied upon in the instant case, which were overruled and final judgment given against the Railroad Companies making the taxes a paramount lien against their property; and that an appeal was then pending in the State Supreme Court.

This court stated the position of Adams in support of his motion to dismiss as follows:

"The argument is that, inasmuch as the injunction in this suit was vacated by the circuit court, the assessment of taxes completed, and suit brought upon it and judgment recovered, the appeal in this case is abortive and improper for the reason that the very things the bill was filed to prevent are accomplished facts, and the railway companies cannot be injured, inasmuch as they have a complete remedy by writ of error to the supreme court of the state from this court, if any Federal question be involved and decided against them by that court."

Answering this contention, the court said:

"We are of opinion that this is a defense to the *merits* of the case, and is no ground for the dismissal of the appeal. It would hardly be contended that, if this decree of the state court had been pronounced before the bill was filed in the Federal Court, the appeal would be dismissed upon motion upon that ground; much less that it could be set up as ground for dismissing an appeal to this court. The case is not different, if the decree, instead of being rendered before the bill is filed in the Federal court, is rendered after such a bill is filed, and pending suit. In either case it is a question whether it operates as an estoppel. While the fact that an appeal has been taken from such decree, which is still pending, introduces a new element, it is still the same question whether the decree can be made available as an estoppel upon motion to dismiss. (Italics ours).

> "It is true that since the injunction against him was dissolved, Adams has sued and has succeeded, but it does not follow that his judgment may *not be reversed* by the supreme court when plaintiff's right to prosecute this bill would be revived."

The basis of this court's decision is that the defense based upon action taken in the state court, alleged to render successful prosecution of its appeal by the plaintiff impossible, goes to the merits and cannot be raised in support of a motion to dismiss an appeal involving solely a question of jurisdiction.

In both the Illinois Central case and the case at bar, decrees were entered by a state court involving the matter in controversy in the federal court, pending an appeal to this court from a lower federal court. In both, the action of the state court is invoked in support of a motion to dismiss. In the Illinois Central case an appeal from the decree of the state court was pending at the time of the hearing of the motion to dismiss in this court. In the instant case there is still time to appeal from the final order of the Circuit Court of Kanawha County confirming the sale to the Glass Companies. As admitted by them, under the statute of West Virginia eight months is allowed from the entry of any decree for an appeal therefrom (Code of W. Va., Ch. 58, Art. 5, Sec. 4).

Old Colony Trust Co. v. *Seattle*, supra, was an ap-

peal by the plaintiff from a decree of the District Court for the Western District of Washington, dismissing its bill filed there to enjoin enforcement of a collusive agreement to shift a tax on city property to property of the complainant. The bottom question was the validity of the taxes involved. The District Court dismissed the bill on the ground that it constituted a suit against the state, and allowed a direct appeal to this court certifying the question of jurisdiction. The defendants filed a motion to dismiss, stating two grounds, the first, that the taxes had been paid about three weeks prior to the decree of dismissal by plaintiff's mortgagor and that this put an end to the effort of the state to collect them, and second, that since the appeal was taken, a decree had been rendered in another suit between the mortgagor and the defendants which determined the question relating to these taxes in favor of the defendants. This court overruled the motion to dismiss on the ground that both questions went to the merits and could not be considered upon a motion to dismiss where the only question before the court was jurisdictional.

Male v. *Atchison, etc., Ry. Co.*, supra, was a direct appeal from the District Court of the United States for the Southern District of New York to review a decree which dismissed for want of jurisdiction plaintiff's bill in a suit to enforce the liability of a Kansas corporation upon the bonds of a railroad company incorporated under an Act of Congress. A motion to dismiss was made on the ground that the questions involved

were moot for the reason that subsequent to the dismissal of the bill in the lower court, the appellant had instituted suit in the Supreme Court of New York upon the same cause of action against the same defendants, and that therein a final judgment upon the merits had been rendered dismissing the cause. This court stated that the question before it was one of jurisdiction and said:

> "But as our power to review is limited to the question of jurisdiction alone, and as the ground of the motion obviously involves the defense of 'the things adjudged,' going to the merits, the motion to dismiss is overruled, and we come to consider the question of the jurisdiction of the court below; that is, whether, as a Federal court, it had power to entertain the cause."

CONCLUSION

It is therefore respectfully submitted that the motion of the Respondents, Owens-Illinois Glass Company, a corporation, and Libbey-Owens-Ford Glass Company, a corporation, to dismiss the writ of certiorari heretofore granted herein on October 12, 1936, be denied.

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